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Attorneys for Complainant

BEFORE THE DEPARTMENT OF CORPORATIONS
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation of THE)	Case No.: 963-2077
CALIFORNIA CORPORATIONS)	
COMMISSIONER,)	ACCUSATION
)	
Complainant,)	
)	
vs.)	
)	
NEWPORT BEACH ESCROW CORP. and)	
DAMIAN ROBERT KUTZNER,)	
)	
Respondents.)	

The Complainant is informed and believes, and based upon such information and belief, alleges and charges Respondents as follows:

I

Respondent Newport Beach Escrow Corp. ("Newport") is, and at all times relevant herein was, an escrow agent licensed by the California Corporations Commissioner ("Commissioner" or "Complainant") pursuant to the Escrow Law of the State of California (California Financial Code Section 17000 et seq.). Newport has its principal place of business located at 660 Newport Center Drive, Suite 250, Newport Beach, California 92660.

1 Respondent Damian Robert Kutzner ("Kutzner") was at all times relevant herein, the owner
2 and president of Newport.

3 II

4 On or about August 3, 2006, the Commissioner commenced a regulatory examination of the
5 books and records of Newport. The August 2, 2006 Escrow Trial Balance obtained at the
6 commencement of the examination disclosed that three escrows, including the fee account, had debit
7 balances totaling \$18,557.73. Additionally, a review of the most recent trust account reconciliation
8 dated June 30, 2006 revealed thirty-five (35) adjusting items, some dating back to September 2005,
9 resulting in an adjusted bank balance of negative \$392,134.26. Further review into the debit balances
10 disclosed on the August 2, 2006 Escrow Trial Balance revealed that the debit balances totaled
11 \$25,244.73 and were caused by overdrafts on the fee account in violation of California Financial
12 Code section 17409 and unauthorized disbursements of trust funds from two escrows in violation of
13 California Financial Code section 17414(a)(1) and California Code of Regulations, title 10, section
14 1738, as described in more detail below.

15 The regulatory examination also disclosed that Newport (i) did not have a person stationed at
16 its business location that met the experience requirements of California Financial Code section
17 17200.8, (ii) had failed to report at least two escrow managers in violation of California Financial
18 Code sections 17209(g) and 17212.1 and California Code of Regulations, title 10, section 1726, (iii)
19 had failed to report trust fund misappropriations as required by California Financial Code section
20 17414(c) as more fully discussed below, and (iv) had failed to provide books and records to the
21 Commissioner in violation of California Financial Code section 17404 and California Code of
22 Regulations, title 10, sections 1732.2, 1732.3, and 1737.3 as follows:

23 a. Month End Reports, including checks issued/adjusted, receipts issued/adjusted, wires
24 issued/adjusted, trial balance and "current status" reports and trust reconciliation "top sheets" and
25 outstanding checks, for the months of July 2005 through January 2006.

26 b. Receipts and bank deposit tickets for the period of March 1, 2006 through August 3,
27 2006.

- c. Financial statements (balance sheet, income statement and general ledger as of July 31, 2006).
- d. General bank account reconciliation as of July 31, 2006;
- e. List of bank accounts and affiliates; and
- f. Cleared checks that paid the current surety bond premium.

On or about September 26, 2006, Newport provided the Commissioner with a copy of the July 31, 2006 and August 31, 2006 trust account reconciliations and trial balances. The August 31, 2006 trust account reconciliation contained amended top sheets dated September 18, 2006 and September 25, 2006. A review of the most recent top sheet for the August 31, 2006 trust account reconciliation discloses that adjustment number 13 is listed as a book adjustment, but is actually a bank adjustment. When properly applied to the book and bank balances, it transforms the balance from a positive \$110,433.13 to a negative \$47,760.87.

On or about October 31, 2006, Newport provided the Commissioner with a copy of the September 30, 2006 trust account reconciliation and trial balance. Demands were made for the general account bank statements and reconciliations for the months of July, August and September 2006, but were not provided. The September 30, 2006 trust account reconciliation disclosed a trust account shortage of \$25,624.22 that when added to the escrows showing a positive balance for which no funds exist (\$760.10), results in a trust account shortage of at least \$26,384.32.

Based upon the condition of the books and records as described above, the Commissioner had been unable to determine the exact extent of the shortage in the trust account beyond the \$26,384.32 found to date. The Commissioner had made demands upon Newport to cure the trust account shortage found to date, but Newport failed to cure the trust account shortage until on or about November 9, 2006.

III

The debit balances disclosed on the August 2, 2006 Trial Balance consisted of (i) an overdraft of \$4,175.00 in the fee account, (ii) unauthorized disbursements of \$11,889.19 made against a phantom deposit of funds in the same amount in escrow number 3871, (iii) an unauthorized disbursement of \$2,180.54 in escrow number 3954, and (iv) an overdraft of \$313.00 in escrow

1 number 4572. A review of the ledger for the fee account disclosed that the fee account had been
2 continuously overdrawn since on or about March 17, 2006 in violation of California Financial Code
3 section 17409, which prohibits the deposit of escrow trust funds into accounts other than those
4 specifically designated as escrow funds.

5 A review of the escrow files for escrow numbers 3871, 3954 and 4572 revealed that (i) the
6 debit balance of \$11,889.19 in escrow number 3871 was caused by one unauthorized disbursement
7 on or about March 18, 2006 of \$2,195.00 to Newport and two unauthorized disbursements on or
8 about March 18, 2006 of \$2,750.00 and \$6944.19, respectively, to Newport's former unreported
9 escrow manager, Danielle Steffani ("Steffani"), (ii) the debit balance in escrow number 3954 was
10 actually \$9,180.54 and consisted of one unauthorized disbursement on or about March 18, 2006 of
11 \$2,180.54 to Newport and two unauthorized disbursements on or about April 7, 2006 of \$3,500.00
12 each to Steffani, and (iii) that the \$313.00 debit balance in escrow number 4572 had been corrected
13 by a title refund on or about August 3, 2006.

14 IV

15 Newport discovered the misappropriation of trust funds by Steffani on or about April 24,
16 2006, but never reported it to the Commissioner as required by California Financial Code section
17 17414(c). Instead, the Commissioner learned that trust funds had possibly been misappropriated
18 during the course of the August 2, 2006 regulatory examination. California Financial Code section
19 17414, subsection (c), requires that any person having knowledge of any abstraction or
20 misappropriation of trust funds must immediately report it in writing to the Commissioner.

21 V

22 Pursuant to California Financial Code section 17406, Newport was required to submit its
23 audited financial statement for its fiscal year ended December 31, 2005 ("2005 audit report") to the
24 Commissioner by April 15, 2006. Newport has yet to file its 2005 audit report with the
25 Commissioner despite numerous demands.

26 On or about November 7, 2005, the Commissioner notified Newport in writing that its 2005
27 audit report was due April 15, 2006. Newport failed to submit the 2005 audit report by April 15,
28 2006.

1 On or about June 2, 2006, Newport was sent a further letter demanding that the 2005 audit
2 report be filed and notifying Newport that California Financial Code section 17408 authorizes
3 penalties for failure to file the report at \$100.00 per day for the first five days and \$500.00 per day
4 thereafter. Newport was also notified in the letter that failure to file the 2005 audit report could
5 result in an administrative action.

6 Newport has yet to file the 2005 audit report as required by California Financial Code section
7 17406.

8 VI

9 Pursuant to California Financial Code section 17209(g), an application for an escrow agent's
10 license is required to contain a completed statement of identity and questionnaire ("SIQ") for all
11 individual stockholders, directors, officers, trustees, managers, and other persons participating in the
12 escrow business. Two separate SIQ's for Kutzner were filed in connection with the Newport
13 application. Kutzner's SIQ's, dated December 18, 2003 and April 8, 2004, respectively, stated that
14 Kutzner had never been a defendant in any civil action other a divorce, condemnation or personal
15 injury action. Kutzner executed the SIQ's under penalty of perjury that all of the information
16 submitted in his SIQ's was true and correct. The issuance of the escrow agent's license was based
17 upon all the information submitted with the application, including Kutzner SIQ's.

18 Subsequent to the August 2, 2006 regulatory examination, the Commissioner learned that
19 Kutzner had been a defendant in an action brought by the Federal Trade Commission ("FTC") in or
20 about November 2002 wherein Kutzner was alleged to have engaged in numerous false and
21 deceptive practices in violation of Section 5(a) of the FTC Act and Section 521(a) of the Gramm-
22 Leach-Bliley Act. The civil action resulted in a Stipulated Judgment and Order for Permanent
23 Injunction against Kutzner on or about May 5, 2003.

24 Accordingly, the SIQ's submitted by Kutzner in connection with the Newport application
25 were false as Kutzner failed to disclose the FTC action, which had resulted in a final judgment
26 against him only months prior to the first SIQ filed with the Commissioner.

27 Pursuant to California Financial Code section 17209.3, a false statement of a material fact in
28 an application constitutes grounds to deny the license application. Moreover, under California

Financial Code section 17702 it is unlawful for any person to willfully make any untrue statement of a material fact in any application or to willfully omit any material fact, which is required to be stated in any application filed with the commissioner.

VII

California Financial Code section 17608 provides in pertinent part:

The commissioner may, after notice and a reasonable opportunity to be heard, suspend or revoke any license if he finds that:

(b) The licensee has violated any provision of this division or any rule made by the commissioner under and within the authority of this division.

(c) Any fact or condition now exists which, if it had existed at the time of the original application for such license, reasonably would have warranted the commissioner in refusing originally to issue such license.

California Financial Code section 17423 provides in pertinent part:

(a) The commissioner may, after appropriate notice and opportunity for hearing, by order, . . . bar from any position of employment, management, or control any escrow agent, or any other person, if the commissioner finds either of the following:

(1) That the . . . bar is in the public interest and that the person has committed or caused a violation of this division or rule or order of the commissioner, which violation was either known or should have been known by the person committing or causing it or has caused material damage to the escrow agent or to the public.

VII

Complainant finds that, by reason of the foregoing, Respondents have violated California Financial Code sections 17200.8, 17209 subsection (g), 17212.1, 17404, 17406, 17409, 17414 subsection (a)(1), 17414 subsection(c), 17414.1, 17419 and 17702 and California Code of Regulations, title 10, sections 1726, 1732.2, 1732.3 and 1737.3, made false statements of material fact in the application, which are grounds for the commissioner to refuse to issue the license originally, and it is in the best interests of the public to revoke the escrow agent's license of Respondent Newport, and to bar Respondent Kutzner from any position of employment, management or control of any escrow agent.

1 WHEREFORE, IT IS PRAYED that the escrow agent's license of Respondent Newport be
2 revoked, and that Respondent Kutzner be barred from any position of employment, management or
3 control of any escrow agent.

4 Dated: December 11, 2006
5 Los Angeles, CA

PRESTON DuFAUCHARD
California Corporations Commissioner

6 By _____
7 Judy L. Hartley
8 Senior Corporations Counsel
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